

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GUY ALLEN SALLIS,

Defendant-Appellant.

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UNPUBLISHED

April 17, 2007

No. 267261

Wayne Circuit Court

LC No. 05-009294-01

Before: Wilder, P.J., and Sawyer and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree criminal sexual conduct, MCL 750.520b(1)(b), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b). Defendant was sentenced to 5 to 20 years' imprisonment for his first-degree criminal sexual conduct conviction, and to 5 to 15 years' imprisonment for each of his second-degree criminal sexual conduct convictions. We affirm.

Defendant first argues that the trial court abused its discretion when it allowed the prosecution to present evidence of his prior bad acts. We disagree. A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002).

The victim testified that, before the charged events, defendant touched her inappropriately several times. The victim claimed that when she was eight years old defendant told her to sit on his lap and, when she complied with defendant's request, he fondled her butt. On another occasion, the victim claimed that while she and defendant were sleeping in the bedroom together, defendant "went underneath [her] clothes and started touching [her] body." According to the victim, before moving to Michigan in 2000, defendant touched her vaginal area, breasts, butt and stomach on several occasions while sleeping in bed with him. Defendant argues that the trial court abused its discretion when it allowed the victim to testify about these prior bad acts. We disagree.

MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity,

or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Three factors must be present for prior acts evidence to be admissible under MRE 404(b)(1): (1) the evidence must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Evidence of other sexual acts between the victim and the defendant are admissible where they are members of the same household and, without such evidence, the victim's testimony would seem incredible. *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91 (1999). "The decision whether such evidence is admissible is within the trial court's discretion and will only be reversed where there has been a clear abuse of discretion." *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

The first consideration in this matter requires a determination of whether the evidence of defendant's prior bad acts was admitted for a proper purpose. *Knox, supra*, p 509. "A proper purpose for admission is one that seeks to accomplish something other than the establishment of a defendant's character and his propensity to commit the offense." *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). It has been found that it is proper to admit evidence of a defendant's prior bad acts to rebut the defendant's claim that the current charges against him or her are fabricated. *Layher, supra*, p 585. Because defendant theorized that the victim fabricated the charges against him to avoid moving to New Mexico, the prosecution permissibly presented evidence of defendant's prior bad acts to refute this theory. The other bad acts evidence was entered for the purpose of enhancing the victim's credibility and to provide the jury with the circumstances surrounding the charged crimes. For the reasons stated, the evidence was admitted for a proper purpose.

The last two considerations in this matter require that we determine the relevancy of the prior bad acts evidence and whether the probative value of the prior bad acts evidence substantially outweighed its potential for unfair prejudice. *Knox, supra*, p 509. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Here, the evidence was relevant because it explained the events that lead to the current charges and rebutted defendant's theory that the victim was fabricating the charges. The probative value of the prior bad acts evidence was not substantially outweighed by the danger of unfair prejudice because the prior acts evidence was directly relevant to the victim's credibility. *Layher, supra*, p 585.

The trial court did not abuse its discretion when it allowed evidence of defendant's prior bad acts to be admitted. The victim's testimony was offered for the proper purpose of refuting defendant's claim of fabrication, it was relevant to an issue of consequence at trial and the probative value of the testimony was not substantially outweighed by the danger of unfair prejudice. *People v Crear*, 242 Mich App 158, 169-170; 618 NW2d 91 (2000).

In any event, the trial court properly instructed the jury to only consider the evidence of defendant's prior acts for the limited purpose of helping them "judge the believability of [the] testimony regarding the acts for which the defendant is now on trial." The court also instructed the jury that it must not use the prior acts evidence for any other purpose and that it must not

convict defendant because it thinks he is guilty of other bad conduct. The limiting instructions provided by the court were sufficient to eliminate the danger of any unfair prejudice that may have stemmed from the prior acts evidence. For all the reasons stated, the trial court did not abuse its discretion in admitting the prior bad acts evidence.

Defendant next argues that improper opinion testimony was presented to the jury. Defendant argues that, although a witness may not express an opinion on a defendant's guilt or innocence, defendant's wife, Joanne, testified that she believed in defendant's guilt. We disagree. We review this unpreserved issue for plain error affecting defendant's substantial rights. *Knox, supra*, p 508.

MRE 608(a) provides:

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Defendant theorized that the victim fabricated the sexual abuse claims because the family was moving to New Mexico and the victim did not want to move again. In its opening statement, the defense proclaimed that the victim was a "scheming seventeen year old" who "concocted" the entire story to prevent her family from moving out of the state. The prosecutor questioned Joanne about the victim's character for truthfulness because the victim's credibility was attacked by the defense. The prosecution did not ask Joanne to express an opinion about defendant's guilt or innocence. Thus, under MRE 608, it was not improper for the prosecution to elicit testimony from Joanne about the victim's character for truthfulness. *Knox, supra*, p 514.

Defendant argues that, because witness credibility was the deciding factor in this case, testimony from defendant's wife opining that she believed in his guilt strongly affected the jury's ability to perform its function. We disagree. The role of the jury is to determine questions of fact and assess the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Although credibility was a key factor in this case, testimony was presented from all the parties involved, including defendant. The victim testified regarding her version of the events. Defendant also testified and denied the victim's claims. Defendant's mother, Betty Sallis, and his friends, Sharon Kriss and Suzanne Thompson, presented character testimony in defendant's favor and they each maintained that defendant was an honest, trustworthy and moral person. The jury was presented with all the evidence and made its determination accordingly. Defendant has failed to show plain error, much less error requiring reversal, and therefore, his claim is without merit.

Defendant further argues that he is entitled to resentencing because the trial court failed to adhere to the sentencing guidelines when it sentenced him for his second-degree criminal sexual conduct convictions. Defendant argues that because the court failed to prepare a sentencing information report for his second-degree criminal sexual conduct convictions he was sentenced based on inaccurate information. We disagree. We review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

First-degree criminal sexual conduct is a class A felony, while second-degree criminal sexual conduct is a class C felony. MCL 777.16y. It was calculated that defendant's PRV score was 20 points and his OV score was 35 points. Because defendant's PRV score was 20 points and his OV score was 35 points, the sentencing guidelines range was 51 to 85 months' imprisonment for his class A felony conviction. MCL 777.62. Defendant was sentenced to 5 to 20 years' imprisonment for his class A felony conviction and to 5 to 15 years' imprisonment for his class C felony convictions. Defendant's sentences are to be served concurrently. When the court sentenced defendant to a five-year minimum for all his convictions, it did so based on the sentencing guidelines for his class A felony. The trial court did not calculate a sentencing range and/or report for defendant's class C felony convictions. However, if the court scored defendant's class C felony convictions, the sentencing guidelines recommended minimum range would have been 29 to 57 months.

Although defendant argues that the trial court should have prepared a sentencing information report for his class C felony convictions, under *People v Mack*, 265 Mich App 122, 126-127; 695 NW2d 342 (2005), when multiple convictions with concurrent sentences are at issue, the PSIR and accompanying sentence range need only be prepared for the highest crime class felony convictions. Thus, under *Mack, supra*, pp 126-127, the sentencing guidelines are inapplicable to the lower class convictions, providing that the sentences still adhere to the principle of proportionality. Defendant's second-degree criminal sexual conduct sentences are not disproportionate to the offenses. The five-year minimum sentences imposed for defendant's second-degree criminal sexual conduct convictions are only three months higher than the presumptive class C felony sentencing range of 29 to 57 months.

Although this Court, in *Johnigan, supra*, p 472, disagreed with the holding in *Mack* and concluded that the trial court must score the guidelines for all crimes that fall within the scope of the guidelines, *Mack* controls the issue at hand because the language in *Johnigan* is dicta, and the holding in *Mack* did not control the outcome of *Johnigan*. Defendant has failed to show that resentencing on his class C felony convictions is warranted because the trial court did not err by failing to prepare a sentencing range for his class C felony convictions, or in concluding that the sentencing guidelines are inapplicable to his class C convictions, and it did not impose disproportionate sentences for those offenses. *Mack, supra*, p 130.

Finally, we turn briefly to the issue raised in defendant's pro per supplemental brief. First, defendant again challenges the questioning of the victim's mother regarding the victim's credibility. We've already dealt with this issue and there is no need to analyze the issue further. Second, defendant argues that the prosecutor improperly vouched for the victim's credibility during the victim's testimony. The prosecutor did not. Rather, the prosecutor asked the witness whether she was telling the truth. Finally, defendant points to several statements in the prosecutor's closing argument that allegedly improperly vouched for the victim's credibility. See *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). But we read the prosecutor's arguments not as vouching for the victim's credibility, but asserting why the jury should find the victim to be credible.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Alton T. Davis